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Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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**FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Implementation of Sections of the)
Cable Television Consumer Protection)
and Competition Act of 1992:)

Rate Regulation)

MM Docket 92-266

**CONTINENTAL CABLEVISION'S REPLY
TO OPPOSITIONS TO PETITION FOR RECONSIDERATION
OF SIXTH ORDER**

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February 13, 1995

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CONTINENTAL CABLEVISION'S REPLY
TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

The sole opposition to Continental Cablevision's Petition for Reconsideration of the Sixth Order comes from two entrenched programmers: Viacom (MTV) and Lifetime. It is no wonder that these should be the sole holdouts against the broad consensus in favor of Continental's proposal.¹ The Commission's rule forbidding the migration of even a small number of CPST channels to NPT permanently protects existing services from ever competing with new programmers for viewers' attention. New entrants would instead be left to a low penetrated tier, devoid of a few foundation services needed to attract viewers, while existing programmers would be permanently entrenched in lower tiers, regardless of viewer preferences. As FX explains, new entrants should have the right to "earn their way onto regulated tiers based on the merits of their programming, "rather than being relegated to a

¹ In addition to a similar request from Cox, supporters include TCI, Time Warner, Cablevision Industries, Providence Journal, Adelphia, Newhouse, Charter and fX.

lower class of citizenship. ²

The rationalizations of the entrenched programmers simply do not bear up to scrutiny.

"Cloning" these services is no answer to the problem. Cable operators are already under siege with customer confusion over channel choices: cloning will only exacerbate the problem. Moreover, the unwritten assumption behind cloning is that new services will be packaged for free, or virtually for free, with entrenched programming, in order to cultivate viewer loyalty. But exposing an audience through a multi-year free preview is untenable. The most competitive services will be those which carry licensing fees to support the underlying programming. Quality programming generally costs money, and the Commission's rate regulations have reduced operating margins beyond the capacity of cable operators to incur more losses.

MTV and Lifetime warn of the "threats," "risks" of relocation, and predict a "migration spree". Let us examine the facts. Every programmer negotiates an affiliation agreement. Typically, tier position is either directly negotiated or the license fee is set on a sliding scale which increases as the service is assigned to a tier with lower penetration. The contractual right to relocate a service should be governed by marketplace contracts. If MTV and Lifetime have secured contractual protections against retiering, then they will not be

² Comments of fX Networks, February, 3, 1995.

retiered. But MTV and Lifetime are seeking to obtain by regulation a protection against retiering—either a flat prohibition or a programmer veto—even if they cannot obtain it in the marketplace, an indulgence the Commission should be loathe to grant.³ In any event, a one time movement of a small number of channels, which the Commission itself has found to have done no harm, is hardly a "migration spree." Nor have the programmers offered a shred of evidence of any harm they have suffered as a result of the a la carte packaging done by 25% of the cable industry, despite ample opportunity to do so.

MTV and Lifetime lastly complain that Continental's request is merely one for "private equity," rather than the broad public interest which MTV and Lifetime profess to defend. The "equity" which Continental advances is for the Commission to regulate the entire industry by rules uniformly applied. It may well be a matter of "equity" to complain if 25% of the industry is provided a dramatic cash flow advantage, equity value, and borrowing power at the very time that all players are seeking the same capital. But it is also a matter of Equal Protection that the Commission apply rules equally.⁴

³ If there is any marketplace dysfunction or unfair discrimination in favor of affiliates, the remedy lies in Section 616 of the Act, not in a broad channel position guarantee broader even than that which the Commission has granted to broadcasters. Continental Cablevision of Sierra Valleys, Inc., DA 95-71 (January 26, 1995)(leaving broadcasters to negotiate channel position if they are dissatisfied with on-channel carriage). In any event, Continental owns no controlling interest in any nationally distributed satellite network.

⁴ See *Williams v. Vermont*, 472 US 14,23 (1895); *Mayflower Farms, Inc. v. Ten Eyck*, 297 US 266, 274 (1936) (striking down similar distinctions on equal protection grounds), described in Comments of Tele-Communications, Inc. in Support, February 3, 1995. Cablevision Industries' suggestion that the line be extended from September 30, 1994 to December 31, 1994, suffers precisely the same deficiencies. That solution may take care of CVI, but it does nothing to cure the inequities in the Commission's Sixth Order.

The broad consensus among cable operator's serves as a sharp contrast to MTV and Lifetime's request for FCC protection against competition. Even the MSO's who would benefit from the disparate treatment awarded by the Commission support Continental's proposal to level the field.⁵ All of them recognize that the LOI's have drawn arbitrary distinctions.

Continental's proposal offers a rational solution. We propose that every operator have a one-time opportunity to move a small number of BST or CPST services to NPT.⁶ The cases have already determined that a "small number" is 7 or less, although the principles of the Eighth Order⁷ suggest that local franchising authorities could agree to more. No remarketing should be required, per the Commission's negative option rules and decisions.⁸ The same rule would be applied to those who moved "too many" services to a la carte.

⁵ See, e.g., Time Warner's Response to Reconsideration Petitions, February 3, 1995.

⁶ We disagree with FX's suggestion that, unlike those who have been permitted to migrate a la carte packages to NPT, an operator must provide a substitute channel for each service migrated from a CPST. Not only is this dissimilar treatment for identically situated operators, it would prevent operators with limited channel capacity (like the sample operator in our Petition, with only two vacant channels) from launching an effective NPT. Moreover, the existing rules would automatically compensate customers for any diminution in value, by reducing rates for the CPST to reflect each migrated channel. In addition, the Commission has already determined that even a CPST with a small number of channels removed is an effective competitive choice for customers.

⁷ FCC 95-42 (released February 6, 1995) (permitting LFA's to agree to alternative regulation).

⁸ See, e.g., Warner Cable Communications DA 95-60, January 20, 1995; Sixth Order at ¶116.

This relief would provide equality of treatment among MSO's and programmers. It would serve as a safety valve for systems with unusually high cost programming.⁹ It would provide customers with even greater buying flexibility: the ability to buy part of the old CPST on a no buy through (NPT) basis. It would provide new programmers the opportunity to compete for channel position based on quality and merit—a competition which can only help improve the quality of television programming. There is every reason to grant the Petition, and none—save protectionist arguments advanced by MTV and Lifetime—not to do so.

Respectfully submitted,

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⁹ Charter Communications presents a compelling case of a sports package with product costs which exceed the FCC's permissible benchmarks. Under Continental's proposal, these could be moved to an NPT, rather than dropped from the system.